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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

NICK JANKOVICH and PAUL JANKOVICH, Co-Partners, Doing Business as CALUMET AVIATION COMPANY,
Petitioners,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. The Supreme Court of Indiana held that the application to respondent's property, situated in an industrial area, of an airport zoning ordinance prohibiting the erection of structures in excess of 18 feet in height would constitute a taking for which compensation is required by the Indiana constitution and the federal constitution. The question presented is whether

this holding rests on an independent and adequate state ground.

2. If the first question is answered in the negative, then the question presented is whether the application of the airport zoning ordinance to respondent's property would constitute a taking of the property for which compensation is required by the due process clause of the fourteenth amendment to the federal constitution.

STATEMENT

This case was instituted in a state court in Indiana by petitioners who are lessees of portions of an airport owned by the City of Gary, Indiana. (R. 1, 4). The complaint sought relief for injury alleged to arise by reason of respondent's construction on its own property of a toll road. Petitioners asserted that the road extended into the air space to a height prohibited by a zoning ordinance adopted by the City of Gary. The complaint asked for both injunctive relief and for damages for alleged loss of future profits. (R. 8-10). To understand the issues involved in the litigation and on this appeal a statement of certain background facts is necessary.

After the end of World War II the City of Gary, Indiana, decided to build a new municipal airport. A Master Plan was adopted, and a "first phase" construction project undertaken. (R. 78). Federal financial assistance was made available and the project was begun in 1949. (R. 31). In that year, the city adopted an ordinance designed to regulate the height of structures on land in the vicinity of the airport. The city purported to promulgate this ordinance pursuant to

an enabling act adopted by the Indiana legislature in 1945. (R. 152).[1]

The ordinance divided the area surrounding the airport into zones. The "Inner Area Approach Zone" extended 6,000 feet from the end of the runways proposed by the Master Plan.[2] The ordinance prohibited the erection of structures in this zone that would intrude into the air corridor established by a 40 to 1 glide angle measured from the end of the proposed runways. (R. 154).[3] In the case of the proposed north-south runway, which was designed eventually to extend to within 443 feet of the airport's south boundary, application of the ordinance would prevent the erection of structures more than 18.08 feet in height on land that bordered on the airport's south boundary. (Pet. Br. 7).[4]

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[1] 5 Burns' Ind. Stat. § 14-422 (1964 Repl.). One question presented to but not decided by the court below was whether the Gary ordinance, in view of its failure to provide for compensation in the event its application in any particular case constituted a taking, was a valid exercise of the authority granted to local government units by the state's enabling act. (R. 210; Appellant's Brief to the Supreme Court of Indiana, p. 228). The briefs of the parties below have been certified to this Court and are part of the original record lodged with the Clerk.

[2] An "approach zone" is an area in space beyond the limits of an airport runway that extends over the property of adjacent landowners, and through which planes pass in landing or taking off.

[3] A 40 to 1 glide angle means that for every forty feet from the end of a proposed runway one foot is added to the maximum permissible height of structures. For example, on land 80 feet from the end of a proposed runway the maximum permissible height for structures would be two feet.

[4] The ordinance provides that glide angles will be measured from an elevation of 590 feet. If respondent's land were at that level the height limit imposed by the ordinance would be approximately 11 feet. Since the elevation of respondent's land is 583 feet, an additional seven feet is added in computing the maximum height of structures permitted by the ordinance.

In 1950 petitioners executed an agreement with the city by which they leased a portion of the airport property in order to conduct a "Fixed Base Operator" business. (R. 162-178). The operator of the airport was and is the Gary Board of Aviation Commissioners; however Nick Jankovich, one of the petitioners, was the airport manager. (R. 204). The agreement authorizes petitioners to perform a number of airport services.

Thereafter respondent, a corporation created in 1951 by the laws of Indiana, proposed to construct a portion of the Indiana Toll Road in the vicinity of the Gary airport. The proposed route of the road caused some concern among city officials for a number of reasons and disputes arose between the city and respondent. One of the points that concerned the city officials was the location of the road in relation to the airport. The disputes were ultimately resolved by a settlement agreement (discussed more fully at pp. 55-56, *infra*) executed in August 1955 by respondent, the City of Gary, and a number of official agencies of the city including the Board of Aviation Commissioners. The agreement approved a modified route for the toll road. As part of the agreement respondent agreed to pay the City of Gary $1,500,000 in compensation for any losses and expenses incurred by the city by reason of the construction and operation of the toll road.[5] In 1955 and 1956 respondent constructed the road along the route approved in the agreement. (R. 50).

The toll road borders the south boundary of the airport property at the point where the road inter-

[5] The settlement agreement was inadvertently omitted from the printed record. It appears in the original record as Defendant's Exhibit D (Tr. 949) and was received in evidence at Tr. 948.

sects the south approach zone of the north-south runway, one of the two runways at the airport. The property in question in this case is the land and air space on and in which the toll road is constructed that is within and beneath the Inner Area Approach Zone of the north-south runway. (R. 209-210). That property was acquired by respondent some time before the road was built. (R. 50). At all times since construction of the highway the south end of the north-south runway has been 1,043 feet from the south boundary of the airport (and the north edge of respondent's property). (Def. Ex. A, R. 93, 186). Extension of the north-south runway in accordance with the Master Plan would bring it within 443 feet of the north edge of respondent's property.[6]

Application of the ordinance would prohibit the erection of structures more than 18.08 feet above the surface of respondent's land. The toll road extends approximately 30 feet above the surface of respondent's land. It exceeds by approximately 12 feet the maximum height limitation imposed by the ordinance. (Pet. Br. 7-8).

A railroad catenary system is located behind and adjacent to respondent's property in the approach zone to the north-south runway.[7] Behind the catenary system and also in the approach zone are obstruction light poles that were erected at petitioners' request to warn night fliers of the existence of the cate-

[6] For purposes of this appeal respondent assumes the correctness of petitioners' statement that there remain 600 unconstructed feet at the south end of the runway according to the Master Plan. (Pet. Br. 4).

[7] A catenary system is a system of overhead electrical transmission cables.

nary system. (R. 111). The highest pole intrudes 46 feet into the approach zone; the catenary system intrudes 37 feet.[8] These obstacles existed prior to the construction of the road. (R. 81-82). Their existence requires a steeper glide slope for ascending and descending planes than does the toll road. The glide angle from the top of the obstruction light poles to the end of the north-south runway is 21.7 to 1; from the top of the catenary system to the end of the runway it is 24.4 to 1. (R. 99). The glide angle from the north edge of the toll road to the end of the runway is 27.4 to 1, after allowing for the height of vehicles using the roadway. (R. 73).

Petitioners commenced this lawsuit by filing a complaint in the state court in Indiana on July 26, 1956. The complaint alleged that the erection of the toll road violated the Gary airport zoning ordinance, that by virtue of the ordinance and their lease petitioners had a property interest in the Inner Area Approach Zone air space into which the toll road intruded, that their business would suffer as a result of the erection of the road since the road would restrict the use of the Gary airport by certain types of planes, and that they were entitled to an injunction against maintenance of the road and to damages for prospective loss of business. (R. 1-10).

After trial, the Porter Circuit Court, Porter County, Indiana, denied petitioners' prayer for injunctive relief but entered a judgment awarding petitioners $164,000 damages for prospective loss of business. (R. 20). The Supreme Court of Indiana reversed, holding that

[8] These figures were computed from Defendant's Exhibit A (R. 186) based on petitioners' assertion that there remain 600 unconstructed feet at the south end of the north-south runway.

the zoning ordinance on which petitioners' claim rested could not be validly applied to respondent's property because the application would amount to a taking without the payment of just compensation in violation of the constitution of Indiana and the Constitution of the United States. (R. 208-217).[9] This Court granted the petition for a writ of certiorari on May 25, 1964. 377 U.S. 942.

SUMMARY OF ARGUMENT

I.

This Court has held that it will not review a state court judgment that rests on independent and adequate state ground, even though the state court also passed on a federal question. Before this Court will exercise its jurisdiction it must appear "affirmatively from the record" that resolution of the federal question was a necessary ground of the state court's decision. *Lynch* v. *New York ex rel. Pierson,* 293 U.S. 52, 54 (1934); *Honeyman* v. *Hanan,* 300 U.S. 14, 18 (1937). In this case the decision of the Supreme Court

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[9] The Supreme Court of Indiana did not pass upon a number of questions under Indiana law raised by respondent. These questions included: (1) whether the settlement agreement between respondent and the City of Gary, referred to at pages 55-56, *infra,* discharged respondent of any liability to petitioners (Appellant's Br. 229-230, 249), (2) whether the zoning ordinance complied with the Indiana statute authorizing municipalities to adopt airport zoning ordinances (*Id.* at 228-229, 232-238), (3) whether limitations on land use imposed by a municipal zoning ordinance are valid as against an agency of the state possessing the power of eminent domain that subsequently acquires land (*Id.* at 229, 243-244), (4) whether the petitioners' proof of damages was sufficient to support the judgment of the trial court (*Id.* at 230-231, 260-269). If this Court should reverse, these questions will again be before the Supreme Court of Indiana.

of Indiana rests on an independent and adequate state ground. This Court therefore has no jurisdiction to review and should dismiss the writ of certiorari.

A.

The court below squarely held that the application to respondent's property of an 18-foot height limitation contained in the Gary airport zoning ordinance would constitute a taking of property for a public use for which compensation is required by article 1, section 21 of the Indiana constitution as well as by the fourteenth amendment to the federal constitution. In reaching this conclusion the court relied on the provisions of the Indiana constitution, on an Indiana statute providing that landowners have property rights in the air space above their land, on its own prior decisions, on decisions in other states and on decisions of this Court.

The interpretation and application of the Indiana constitution by the court below was not the result of "federal constraint" or of the "compulsion of this Court's opinions," as petitioners assert. As the opinion shows, the court below used the decisions of this Court, as well as those of other states and its own prior decisions, simply as "persuasive authorities" for its independent interpretation of the state constitution. The fact that the court below in applying the state constitution cited and relied upon decisions of this Court as "persuasive authorities" does not establish that the state ground of decision is "inextricably entwined with the federal ground." *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556 (1940); *City of New York* v. *Central Savings Bank*, 306 U.S. 661 (1939).

B.

There is no merit in petitioners' contention that the decision on the state ground is not adequate because it conflicts with the supremacy clause. The decision does not invade any power reserved to the federal government by the Constitution, nor does it conflict in any way with any federal statute. In effect petitioners are arguing that if Indiana either by constitutional provision or by statute expressly provided that the establishment of airport approach zones should be achieved by the exercise of the power of eminent domain or by some other method that required the payment of compensation to landowners such state action would be invalid under the supremacy clause. No authorities support this extraordinary proposition.

The Federal Airport Act does not support petitioners' argument. That Act does not prohibit the states from paying compensation to landowners whose property is adversely affected by the establishment of airport approach zones, nor does it contemplate that the establishment of such zones will be accomplished solely by zoning and without compensation. In fact the statute recognizes that in some cases compensation will be required. The regulations adopted by the Federal Aviation Agency to implement the Federal Airport Act and the FAA's model airport zoning ordinance promulgated as a guide to local communities recognize that the imposition of height limits like the one involved in this case should be achieved by the payment of compensation and not by zoning.

II.

If the Court does not dispose of this case by dismissing the writ of certiorari it should affirm the decision below, for the Supreme Court of Indiana was correct in holding that application to respondent's property of the Gary airport zoning ordinance would constitute a taking of property without compensation in violation of the fourteenth amendment.

A.

Petitioners (and the *amici curiae*) assume that the court below held all airport zoning regulations invalid and direct their argument principally to the general proposition that airport zoning is an important and desirable method of protecting airport approaches from dangerous obstructions. This general proposition is irrelevant because the court below did not hold that the fourteenth amendment makes all airport zoning regulations invalid. It did not hold that the Gary ordinance was invalid in all circumstances. It decided only that the Gary airport zoning ordinance would make it unlawful to maintain on respondent's property any structure exceeding 18 feet in height and that this would constitute a taking of that property for which compensation must be paid. It did not invalidate the ordinance where its effect would be simply to regulate the use of land without so substantially affecting it as to constitute a taking.

The opinion of the Supreme Court of Indiana plainly shows that the decision is based on the application of the Gary airport zoning ordinance to the property involved in this case—not an abstract consideration of the ordinance unrelated to its application. But

even if it is assumed, contrary to fact, that the Supreme Court of Indiana invalidated the Gary ordinance in its entirety, it does not follow that the court held broadly that airport zoning is a constitutionally impermissible method of providing safe approaches for airports. The correctness of the decision turns on the fact that the application of the ordinance to respondent's property would have prohibited any structure extending more than 18 feet from the ground and that this so far interfered with the normal and reasonable use of the property as to amount to a taking. There is nothing in the decision below prohibiting the City of Gary from enacting an airport zoning ordinance containing height limitations that are not so low as to constitute a taking within the meaning of the fourteenth amendment.

B.

A zoning regulation, like any other exercise of the police power, may so substantially diminish property rights as to be a taking in the constitutional sense. See *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594 (1962); *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922).

The intrusion into and the use of the air space above land may so far diminish or impair the rights of the landowner as to constitute a taking. *United States* v. *Causby,* 328 U.S. 256 (1946); *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962).

The Gary airport zoning ordinance as applied to respondent's property would make it unlawful to maintain on that property any structure exceeding 18 feet in height. The imposition of this height limi-

tation would constitute a taking for which compensation must be paid because it is a direct deprivation of the right of a landowner to control and to use "the immediate reaches of the enveloping atmosphere." *United States* v. *Causby,* 328 U.S. at 264.

The Federal Aviation Agency's regulations adopted to implement the Federal Airport Act, its model airport zoning ordinance, and the report of the President's Airport Commission all recognize that a height limitation of 18 feet is so substantial an interference with the normal use and enjoyment of the property that it should not be imposed by zoning regulations and without the payment of compensation. Under the regulations local authorities constructing an airport are now required, as a condition to receiving federal aid, to acquire title to property that is situated as respondent's property is in this case. The zoning ordinance here involved, as applied to respondent's property, imposes a height limitation that is lower than those specified in the model airport zoning ordinance promulgated by the FAA.

There is no substance in petitioners' argument that the height limitation imposed by the Gary ordinance is not a taking because it is "strictly germane to preserving unobstructed approaches to the airport and essential to maintaining safe flight." (Pet. Br. 43). Even an exercise of the right of eminent domain must be reasonably related to a proper governmental purpose; otherwise the taking is not for a public use. Petitioners' argument confuses the question whether there has been a taking with the question whether the taking is for a "public use." The latter question is not involved in this case. The question here is whether the imposition of an 18-foot height limitation to re-

spondent's property would be a taking, not whether it would be a taking for a public use. Respondent submits that the imposition of such a height limitation would so substantially interfere with the normal and reasonable use of the property located in a highly industrial area as to constitute a taking for which compensation must be paid even if it is assumed that the taking would be for a public use. On the question whether there would be taking the decisions of this Court in *Causby* and *Griggs* and the actions of the federal aviation authorities described above show that the Gary ordinance as applied to respondent's land transcends constitutional limitations.

The theory of petitioners' claim for damages necessarily assumes that the Gary ordinance effected a taking of rights in property adjacent to the airport. Petitioners based their claim for damages on the ground that they have property rights in the airport approach zone that respondent has invaded. In the court below petitioners asserted that "the zoning provisions constituted easements appropriated by the City which became a part of our leasehold." Petitioners' theory is fatal to their argument that there would not be a taking if the ordinance should be applied to respondent's property. If, as petitioners assert, they own an "easement" in the air space above respondent's land, which the city acquired by reason of the zoning ordinance, and which was conveyed to petitioners as part of the lease agreement, it necessarily follows that the easement was appropriated from the owner of the land. That appropriation plainly constituted a taking for which no compensation was paid.

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF INDIANA RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND

The rule that the Supreme Court will not review a state court judgment that rests on an adequate and independent state ground, even though a federal question is raised in the case, is a venerable principle of constitutional law. This Court made clear only last Term that its "policy of refusing to decide a federal question in a case that might be controlled by a state ground of decision" follows necessarily from its "constitutional inability to render advisory opinions." *Bell* v. *Maryland*, 378 U.S. 226, 237 (1964).

Before this Court will exercise its jurisdiction it must appear "affirmatively from the record" that resolution of the federal question was a necessary ground of the state court's decision. *Honeyman* v. *Hanan*, 300 U.S. 14, 18 (1937); *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52, 54 (1934), and cases there cited. This rule precludes review where a state court rests its decision on both a state ground and a federal ground. As the Court said in the *Lynch* case (*Id.* at 54-55):

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

In the *Lynch* case the Court dismissed the writ of certiorari as improvidently granted because it was unclear whether the decision of the Court of Appeals of New York rested on the federal ground or on an inde-

pendent state basis, saying that the jurisdiction of this Court could not be founded on "surmise."

Application to the present case of the principles on which these cases rest requires dismissal of the writ of certiorari. It does not appear "affirmatively from the record" that resolution of the federal question was necessary to the decision of the Supreme Court of Indiana. On the contrary, the opinion of that court affirmatively demonstrates that its decision rests on an independent state ground sufficient to sustain the judgment. It follows that this Court should decline jurisdiction without regard to whether the court below also purported to decide a question of federal law.

A. The Opinion of the Supreme Court of Indiana Shows That Its Judgment Rests on an Independent State Ground.

The question considered by the Supreme Court of Indiana was whether the application to respondent's property of an airport zoning ordinance that prescribed the maximum height of structures on nearby land would "effect a taking of private property for public use in violation of the provisions of Article 1, § 21 of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States." (R. 210).

The court began its discussion of this question with a citation of article 1, section 21 of the Indiana Constitution,[10] the fourteenth amendment to the United

[10] "No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

States Constitution, a decision of this Court [11] and one of its own earlier decisions.[12] (R. 211). The cases cited by the court stand for the familiar rule, applicable in Indiana as elsewhere, that regulations enacted ostensibly in furtherance of the police power can so substantially affect certain property rights as to constitute a taking of those rights for which just compensation must be paid.

The court then posed two issues: (1) whether a landowner has constitutionally protected property rights in the air space above his land; and if so, (2) whether the property rights in the air space involved in this case were taken without compensation. (R. 211).

The court commenced its consideration of the first issue by citing an Indiana statute declaring that landowners own the air space above their land.[13] The court went on to note that a landowner's property interest in the air space above his land has also been recognized in judicial decisions, citing a decision of the Supreme Court of Indiana,[14] two decisions of this Court,[15] and a decision of the Supreme Court of Washington.[16] (R. 211-12).

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[11] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[12] General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N.E. 309 (1930). This decision held that a zoning ordinance could not be used to compel the removal of billboards without the payment of compensation.

[13] 5 Burns' Ind. Stat. § 14-103 (1956 Repl.).

[14] Capitol Airways v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N.E. 2d 776 (1938).

[15] United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962).

[16] Ackerman v. Port of Seattle, 55 Wash.2d 400, 348 P.2d 664 (1960).

Petitioners argue that the decision below was reached "by force of this Court's decisions, and the federal constraint exerted by them." (Pet. Br. 52). The opinion of the Court below belies this claim. In deciding that "the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation" (R. 213) the court relied primarily upon the Indiana statute. The court did not suggest that in interpreting the state statute it was bound by the decisions of this Court. The two decisions of this Court as well as its own prior decision and the decision of the Supreme Court of Washington were treated simply as persuasive authorities with respect to the interpretation and application of that statute in the present case. Had the court below been indulging in "necessary obedience" to this Court's views, as petitioners assert, it would have been unnecessary for it to cite the Indiana statute, and pointless to cite its own prior decision or the decision of the Supreme Court of Washington. In short both the language and the reasoning of the court below negate petitioners' contention that the premises of its decision "are derived from the compulsion of this Court's opinions." (Pet. Br. 52).

The court's analysis of the second of the two issues, *i.e.*, whether the application of the ordinance to respondent's property would be a taking without compensation, also negates the assertion that the decision was reached because of "necessary obedience to this Court's views." (*Ibid.*) The court drew a distinction "between zoning regulations which merely restrict the enjoyment and use of property through a lawful exercise of police power, and the taking of property for public use, for which compensation must be paid."

(R. 214). As precedent for this distinction the court cited two of its earlier decisions,[17] three decisions of this Court [18] and a treatise on the law of zoning.[19] It cannot seriously be contended that in acknowledging this distinction the court below was controlled by the "compulsion of this Court's opinions." The distinction is a familiar and elementary one; it has long been embodied in the laws of the several states and it had been recognized and applied by the Supreme Court of Indiana as a principle of Indiana law in *General Outdoor Advertising Co.* v. *City of Indianapolis,* 202 Ind. 85, 172 N.E. 309 (1930) and *Goldsmith* v. *City of Indianapolis,* 208 Ind. 465, 196 N.E. 525 (1935)—decisions that antedated *United States* v. *Causby,* 328 U.S. 256 (1946), and *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962), on which petitioners claim the court below placed "prominent reliance."

The court applied this distinction to the facts before it, holding that the application of the ordinance to respondent's property would appropriate for public use without compensation the ordinarily useable air space of that property. In reaching this conclusion the Supreme Court of Indiana did not cite or rely upon any decisions of this Court but instead treated

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[17] Board of Zoning Appeals of Decatur v. Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954); Goldsmith v. City of Indianapolis, 208 Ind. 465, 196 N.E. 525 (1935).

[18] Gorieb v. Fox, 274 U.S. 603 (1927); Pennsylvania Coal Co. v. Mahon, *supra,* Griggs v. Allegheny County, *supra.*

[19] 1 Metzenbaum, Zoning 70-76 (2d ed. 1955).

the question as one that turned upon the particular facts involved.[20]

In summary, nothing in the opinion of the Supreme Court of Indiana suggests that the decision does not rest on an independent interpretation of Indiana law. The citation of the relevant state constitutional provision, and the reliance on a controlling state statute affirming a landowner's propery interest in air space above his land and Indiana judicial decisions dealing with rights in air space and the distinction between regulation and the taking of property, show that the court below was interpreting and applying the law of Indiana. There is a complete lack of any support for the proposition that the decision was reached only by the "compulsion of this Court's opinions."

Even if the opinion of the court below is read as deriving from this Court's opinions some support for its decision under Indiana law there would be no basis for the exercise of this Court's jurisdiction. This Court has held that if "the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution . . . we would have no jurisdiction to review." *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 556 (1940); *City of New York* v. *Central*

[20] The relevant passage in the opinion of the court below is found in the third full paragraph on page 214 of the Record. Earlier in its opinion the court had set forth the facts relating to the effect of the ordinance upon respondent's use of its land. (R. 209-210).

Savings Bank, 306 U.S. 661 (1939).[21] Had there been no federal question raised and had the court below written an opinion precisely like the one actually written but directed only to the state constitutional question it could not be seriously argued that this Court had jurisdiction to review the decision merely because the court cited opinions of this Court and relied upon their reasoning. A different conclusion is not warranted in this case because a federal question was raised.

Petitioners contend that the state ground of decision in this case is "inextricably entwined with the federal ground" and that therefore the judgment of the court below does not rest upon an independent interpretation of state law. They attempt to support their argu-

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[21] In City of New York v. Central Savings Bank, the Court of Appeals of New York held a municipal dwelling law unconstitutional and had amended its remittitur to make clear that its decision rested on both the state and federal constitutions. In its order amending the remittitur that court explained (280 N.Y. 9, 10, 19 N.E. 2d 659 (1939)) that

> "We gave to the decisions of the Supreme Court of the United States, defining the due process clause, the great weight which, in our opinion, they should have by reason of the prestige of the court and the strength of the reasoning even if technically we might have power to reject them in defining the same clause in the State Constitution. Our conclusion that the statute is repugnant to article 1, section 6, of the State Constitution followed necessarily from our determination that in accordance with a long line of decisions of the Supreme Court of the United States, the statute is repugnant to the Federal Constitution."

Despite the plain statement of the Court of Appeals that it had relied on federal decisions in construing the state constitution this Court denied a petition for a writ of certiorari "for the reason that the judgment sought to be reviewed rests upon a nonfederal ground adequate to support it." 306 U.S. 661.

ment by quoting language of this Court in other cases which lays down the general rule that *if* a nonfederal ground is so interwoven with a federal ground that it is impossible to conclude that the judgment rests on an independent interpretation of state law this Court may exercise its appellate jurisdiction. This general principle is not in dispute. But nothing in the cases cited by petitioners suggests that the state ground on which the Indiana court rested its decision is "inextricably entwined" with the federal ground.

In *State Tax Commission* v. *Van Cott*, 306 U.S. 511 (1939), on which petitioners place principal reliance, the Supreme Court of Utah held that the meaning of a state taxing statute depended on the extent of the state's power under the federal constitution to levy the taxes in question, and that it was bound by the decisions of this Court in resolving this question of federal constitutional law.[22] Rejecting a contention that the decision of the Supreme Court of Utah rested on an independent state ground this Court said that the court's opinion "indicates that 'it thought the federal constitution [as construed by this Court] required' it to hold respondent not taxable." On that basis the Court concluded that the interpretations of the state statute and the federal constitution were "so interwoven that we are unable to conclude that the judgment rests on an independent interpretation of the state law." (306 U.S. at 514).

The present case is in no sense analogous to *Van Cott*. There resolution of the question of federal law was necessarily decisive of the meaning of the state

[22] Van Cott v. Tax Commission of Utah, 95 Utah 43, 61, 79 P.2d 6, 14 (1938).

statute. In this case, on the other hand, the Supreme Court of Indiana did not hold that in interpreting and applying the Indiana constitution it was bound or constrained in any way by the decisions of this Court interpreting and applying the federal constitution.[23]

The decisions in *Enterprise Irrigation District* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917), and *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773 (1931), are also inapposite. In *Enterprise Irrigation District* both a federal and a nonfederal ground were involved in the decision below. The court found on the particular facts involved that the nonfederal ground (estoppel) was independent of the federal question (alleged lack of notice of hearing) and dismissed the case. In *Abie State Bank* this Court held, again on the basis of the particular facts involved, that the question of estoppel was so interwoven with the federal question under the fourteenth amendment that it was not an independent and adequate nonfederal ground. These cases turned on the particular facts and issues presented in each. The issue in the present case is not even remotely related to the issues there

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[23] Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1, (1950), cited by petitioners, also involved a situation in which the state court believed that its action was controlled by the decisions of this Court. No question of an independent state ground for the decision below was involved because the state court believed it was precluded from applying local law.

Perkins v. Benguet Consolidated Mining Co. 342 U.S. 437 (1952), similarly involved a situation in which this Court felt there was reason to believe that the state court had based its decision solely on a question of federal constitutional law. On remand the Supreme Court of Ohio confirmed this interpretation of its earlier decision. Perkins v. Benguet Consolidated Mining Co., 158 Ohio St. 145, 147, 107 N.E.2d 203, 205 (1952).

Rayonier, Inc. v. United States, 352 U.S. 315 (1957), was a suit in the federal courts under the Federal Tort Claims Act. No question of federal jurisdiction was involved.

involved. Hence the opinions in those cases provide no support for the contention that the holding of the Supreme Court of Indiana with respect to the constitution of Indiana is "inextricably entwined" with its holding as to the federal constitution.

Minnesota v. *National Tea Company,* 309 U.S. 551 (1940), also cited by petitioners, is in fact adverse to their contentions. That case involved a challenge to a state tax as violative of both the state constitution and the equal protection clause of the fourteenth amendment. The state supreme court noted that the two constitutional provisions " 'impose identical restrictions upon the legislative power of the state in respect to classification for purposes of taxation.' " After briefly adverting to three Minnesota precedents the court discussed in detail decisions of other tribunals, including decisions of this Court. As to the latter decisions it professed " 'that we should follow them and that it is our duty to do so.' " (309 U.S. at 552, 554).

Despite these indications that the state decision may have been compelled by prior interpretations of the federal constitution this Court declined to review, deciding instead to remand for clarification because it could not state with assurance that the decision of the state court rested on an interpretation of the federal constitution. "It is possible that the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution. If that were true, we would have no jurisdiction to review." *Id.* at 556.[24]

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[24] On remand the Supreme Court of Minnesota declared that its decision rested independently on an interpretation of the state constitution. National Tea Co. v. State, 208 Minn. 607, 608, 294 N.W. 230, 231 (1940).

In the present case, unlike *Minnesota* v. *National Tea Co.*, there was no indication by the Supreme Court of Indiana that it believed itself under a "duty" to follow the decisions of this Court in interpreting its state constitution, or that it regarded the decisions of this Court as anything more than "persuasive authorities."

B. The Independent State Ground of Decision Is Not Invalid Under the Supremacy Clause.

Petitioners contend that even if there is an independent state ground for the decision below it is not "adequate" to sustain a judgment because it is in conflict with the supremacy clause of the federal constitution.

This argument has no merit. There is no federal statute that prohibits the states from paying compensation to property owners whose rights are diminished by the establishment of airport approach zones irrespective of whether the diminution of rights amounts to a taking in the constitutional sense. There is no federal statute that requires or even contemplates that aerial approach zones must always be established by zoning ordinances and never can be established by the payment of compensation. In effect petitioners are arguing that if Indiana either by constitutional provision or by statute expressly provided that the establishment of airport approach zones should be achieved by the exercise of the power of eminent domain or by some other method that required the payment of compensation to landowners such state action would be invalid under the supremacy clause. No authorities even remotely support this extraordinary proposition.

The Federal Airport Act,[25] on which petitioners exclusively rely to support their argument under the supremacy clause, imposes no restrictions upon the states or their political subdivisions in relation to the establishment of airports or the regulation of the rights of landowners adjacent to airports. The act requires the Administrator of the Federal Aviation Agency to prepare and revise annually a National Airport Plan and authorizes the grant of federal funds, under conditions imposed by the Administrator, to assist in the construction of airports included within the National Airport Plan. But the Act is permissive only. No public agency is required to accept federal aid or the conditions imposed by the federal government. In fact, the Federal Airport Act specifically states that it does not authorize a public agency to seek federal aid where the agency is prohibited by the law of such state from doing so.[26]

The refusal of Congress to assert its power to restrict the freedom of action of the states or their local units in the field of airport construction, even though the airports be part of the National Airport Plan, is not the consequence of Congressional unawareness of the problems relating to the establishment of airports, including aerial approach zones. Proposals for federal regulation of land use in the vicinity of airports

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[25] 60 Stat. 170-180 (1946), 49 U.S.C. §§ 1101-1119 (1958).

[26] Federal Airport Act § 9(b), 49 U.S.C. § 1108(b).
The limited reach of federal authority in this field was dramatically illustrated several weeks ago when the Port of New York Authority rejected federal aid on a project to improve the LaGuardia Airport in New York City rather than accept the conditions sought to be imposed by the federal government. Wall Street Journal, August 7, 1964, p. 3, col. 3.

in the states have been made to Congress.[27] At one time the House Interstate and Foreign Commerce Committee recommended adoption of such a law.[28] But Congress declined to follow the recommendation. It has been unwilling to intrude on the traditional state function of regulating land use in the vicinity of airports, and has left to the states full freedom to apply their own concepts of land use regulation. Even assuming that the exercise of a delegated power by Congress could have the consequence of restricting a state's power to require compensation for an interference with property rights, a matter of considerable doubt, the deliberate Congressional decision not to exercise this power eliminates any possible application of the supremacy clause in this case.

To support their argument on the supremacy clause, petitioners do not rely upon any specific provisions of the federal constitution or upon any assertion or exercise of federal regulatory power. Instead, they seek to derive from the purely permissive provisions of the Federal Airport Act a vague concept, sometimes described as "federal aviation policy" and sometimes as the "federal scheme," which they contend is inconsistent with the decision below. In their brief petitioners summarize their argument on this point in two conclusory assertions: (1) "The federal scheme which the Federal Airport Act embodies is based on the necessity of recourse to airport zoning as a governmental means of regulating land use adjacent to airports for the purpose of maintaining unobstructed

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[27] See S. 246, H.R. 1012, 3420, 3491, 78th Cong., 1st Sess. (1943); S. 3129, 82nd Cong., 2d Sess. (1952).

[28] H. Rep. No. 124, 784, 78th Cong., 1st Sess. (1943).

aerial approaches" and (2) "the total nullification of airport zoning worked by the decision below is wholly incompatible with the federal scheme." (Pet. Br. 53-54).

Neither of these assertions is valid. There is no "federal scheme" or "policy" of the kind asserted by petitioners. No federal statute requires or even contemplates that airport approach zones over adjacent land must be established exclusively by airport zoning and without the payment in appropriate circumstances of just compensation. On the contrary, the federal scheme contemplates and in fact encourages the purchase of such land or of interests in the air space above the land. Section 13 of the Federal Airport Act (49 U.S.C. § 1112) lists "costs of acquiring land or interests therein *or easements through or other interests in air space*" (emphasis supplied) among those costs for which federal funds may be used. This is a legislative recognition that in some cases the establishment of approach zones will require compensation for property rights.[29]

The Administrator of the Federal Aviation Agency has adopted regulations to implement the statute. These regulations require, as a condition to federal aid for new airports or for development of new runways at existing airports, *the acquisition of an "adequate property interest in runway clear zone areas"* (emphasis supplied). Under the regulations the "run-

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[29] Section 13 of the Federal Airport Act was described in Griggs v. Allegheny County, 369 U.S. at 93 (dissenting opinion), as authorizing reimbursement for the acquisition of easements "necessary for the clearing and protecting of 'aerial approaches' from physical 'airport hazards.'"

way clear zone area" is measured by reference to the approach zone established by the applicable FAA standards and its length is the distance required for the applicable approach zone to reach a height of 50 feet above the terrain (or 50 feet above the elevation at the end of the runway if that would result in a shorter length). (14 CFR §§ 151.9, 151.11 (Supp. 1964)). It is important to note that respondent's property lies well within the limits of the runway clear zone for the north-south runway of the Gary airport. The lower limit of the approach zone above respondent's land is only 18 feet. Hence, Gary, if it were constructing its airport today, could not qualify for federal aid without acquiring respondent's property.

It is also significant that when the Federal Aviation Agency prepared and promulgated a model airport zoning ordinance for use by the political subdivisions of the several states it recognized that no attempt should be made by zoning to impose a height limitation like the 18-foot limitation here involved on property adjacent to an airport, but that instead rights in such property should be acquired by a taking and the payment of compensation. See pp. 40-41, *infra*.

There is, therefore, no "federal aviation policy" or "federal scheme" which requires or even assumes that a height limitation of the kind imposed by the Gary ordinance should or may be imposed by zoning regulation. On the contrary, the "federal policy" contemplates, and indeed requires as a condition to federal aid, that there be a taking of and the payment of compensation for any land that is situated beneath

an airport approach zone and immediately adjacent to an airport runway.[30]

Petitioners' second assertion—that the decision below involves a "total nullification of airport zoning"—is also without substance. The Supreme Court of Indiana did not hold that all airport zoning ordinances were invalid under the Indiana Constitution; it did not hold that the Gary ordinance was invalid in all circumstances and as applied to all property.[31] As we

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[30] Petitioners cite the 1964 amendment to the Federal Airport Act, which requires that the Administrator of the Federal Aviation Agency receive, as a condition precedent to the approval of federal aid, written assurance that "appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable, to restrict the use of land" in the vicinity of the airport to uses compatible with normal airport operations. They quote from a statement made by the Administrator in support of this amendment. (Pet. Br. 55). The very statement cited shows that the Administrator did not regard the 1964 amendment as contemplating the use of zoning regulations in every case to establish airport approach zones. S. Rep. No. 446, 88th Cong., 1st Sess. 21 (1963) (excerpt from letter of FAA Administrator Halaby). And the fact that the statute speaks of "appropriate action, *including* the adoption of zoning laws" belies the suggestion that Congress believed that zoning regulations were to be the sole method of establishing airport approach zones.

Petitioners refer to the FAA Standard Application Form for federal aid for airport projects. The form does not advance petitioners' argument. It simply requires the project sponsor to prevent obstructions to the airport in accordance with standards established by the FAA *"either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace"* or by zoning. (Pet. Br. 28). As we have seen, the FAA standards would require the acquisition of respondent's land as a condition to federal aid.

[31] Even if the opinion of the Supreme Court of Indiana is read as having invalidated the existing Gary airport zoning ordinance in its entirety, there is nothing in the opinion to suggest that Gary cannot adopt a new ordinance that contains reasonable height limits as, for example, height limits of the kind recommended in the FAA model ordinance. See pp. 40-41, *infra*.

shall show at pages 32-35, *infra*, the Supreme Court of Indiana held only that the ordinance was invalid as applied to respondent's property. But even if the Supreme Court of Indiana had held that, under the state constitution, all zoning ordinances imposing height limitations on land immediately adjacent to an airport are invalid unless there is a provision for compensation no supremacy clause problem would be presented. There is no obligation imposed on the states by the federal government to construct airports or to establish unobstructed approach zones. Surely if the states are not obligated to establish approach zones at all, they are not prohibited, if they elect to establish such zones, from paying compensation to affected property owners.

The decision of the court below interpreting and applying the constitution of Indiana was both an independent and an adequate ground of decision. It follows that this Court should decline to exercise its jurisdiction.

II. THE COURT BELOW DID NOT ERR IN HOLDING THAT AN AIRPORT ZONING ORDINANCE PROHIBITING THE ERECTION OF STRUCTURES IN EXCESS OF EIGHTEEN FEET IN HEIGHT ON PROPERTY SITUATED IN AN INDUSTRIAL AREA CONSTITUTES A TAKING OF PROPERTY FOR WHICH COMPENSATION IS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

So far our argument has been directed to the question whether this Court should decline to exercise its appellate jurisdiction because the judgment of the Supreme Court of Indiana rests on an independent and adequate state ground. If the case is not disposed of on that basis this Court will be required to decide whether as a matter of federal constitutional law the zoning ordinance here involved is invalid as applied to respondent's property.

Petitioners (and the *amici curiae*) approach this question on the assumption that the court below held all airport zoning regulations invalid and they direct their argument principally to the general proposition that airport zoning is an important and desirable method of protecting airport approaches from dangerous obstructions. This general proposition is irrelevant because the court below did not hold that the fourteenth amendment makes all airport zoning regulations invalid. It did not hold that the Gary ordinance was invalid in all circumstances. The lower court decided only that the Gary airport zoning ordinance as applied to respondent's property would make it unlawful to maintain any structure exceeding 18 feet in height and that this would constitute a taking of the property for which compensation must be paid. It did not invalidate the ordinance where its effect would be simply to regulate the use of land without so substantially affecting it as to constitute a taking.[32] The failure of petitioners and the *amici* to comprehend this distinction in the opinion of the court renders much of their argument extraneous to the real issue in this case, which is whether the Gary airport zoning ordinance, if applied to the property involved in this case, would effect a taking of that property.

The question of the scope of the decision below is of substantial importance in relation to the constitutional issue that petitioners seek to raise before this

[32] The maximum permissible height of structures in the area covered by the Gary ordinance is 150 feet (R. 154). Application of a 150-foot limitation on the height of structures raises a different question than does the application of an 18-foot limitation.

Court.[33] For that reason we propose to discuss that point before turning to the constitutional question.

A. The Court Below Did Not Hold Broadly That All Zoning Regulations Are Invalid or That The Gary Airport Zoning Ordinance Was Invalid in Its Entirety.

At every step of the way the opinion of the Supreme Court of Indiana makes clear that the decision is based on the application of the Gary airport zoning ordinance to the property involved in this case—not on an abstract consideration of the ordinance unrelated to its application. At the outset, the court stated that the question before it was whether the ordinance was unconstitutional "in that it purported to appropriate, without compensation, the reasonable and ordinary use of property *on which appellant constructed its toll road.*" (R. 210; emphasis supplied). This statement of the issue indicates as clearly as words permit that the court was considering the constitutionality of the ordinance as applied to the property involved in this case.[34]

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[33] Even if it is assumed, contrary to what we believe to be the case, that the court below held the Gary ordinance invalid in a general and abstract sense, we do not suggest that this Court should consider the federal constitutional question in such general and abstract terms. If the Court decides to exercise its appellate jurisdiction, the question presented is whether the ordinance is invalid as applied to the particular property here involved. It would be unnecessary for this Court to consider the validity of the ordinance as it might be applied to other property or in other circumstances.

[34] In Board of Zoning Appeals of Decatur v. Jehovah's Witnesses, 233 Ind. at 87-88, 117 N.E. 2d at 118, one of the cases cited by the Supreme Court of Indiana, it had recognized that a zoning ordinance might be "valid generally but invalid as applied to certain property."

The court set forth two issues the resolution of which was necessary to its decision: (1) whether property rights can exist in air space above land, and (2) "whether *in the instant case* there has been a constitutionally proscribed taking." (R. 211; emphasis supplied). Again the language chosen reflects the view that application of the ordinance to the property in this case would determine the outcome of the suit.

The first issue was resolved by holding that the "reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation," (R. 213) a proposition that cannot be disputed.[35]

The second issue was restated to be "whether an unconstitutional taking has resulted *in the instant case*" (R. 214; emphasis supplied); again, a limitation

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[35] Respondent desires to correct a mistaken impression that may be conveyed by petitioners' misleading quotation from the opinion of the Supreme Court of Indiana. Petitioners quote the court as saying: "Had the . . . [adjacent property owner] chosen to erect flagpoles, factory chimneys, or tall buildings across the whole of its land, and several times as high as its power line, it was within its rights notwithstanding it might have entirely prevented the landing of airplanes at . . . [the] airport." (Pet. Br. 50). Petitioners' use of this excerpt distorts the court's meaning. The language does not refer to respondent's use of its land or to the Gary airport. It comes from another decision, and was quoted by the court solely to demonstrate that landowners have property rights in superadjacent air space. The case in which the language appears (Capitol Airways v. Indianapolis Power & Light Co., *supra*) held that the adjacent landowner could "erect flagpoles," etc., notwithstanding the effect on the nearby privately-owned airport *because* there was no zoning ordinance on the books that prohibited such uses of land by the adjoining landowners.

of the decision to the application of the ordinance to respondent's property. By way of preface to the second issue the court drew the familiar distinction between regulation that restricts the enjoyment and use of property and a taking of property for which compensation is required. As an example of valid regulation the court referred to building set-back rules common to comprehensive zoning laws, thereby demonstrating an appreciation of the role of the zoning power in land use regulation.

After explaining the distinction between regulation and taking, the court decided that the ordinance in question attempted to take *"the ordinarily usable air space of property adjacent* to the Gary Airport without the payment of compensation." (R. 214; emphasis supplied). The repeated references to the property "in the instant case" require the conclusion that the "property adjacent to the Gary Airport" referred to by the Court was respondent's property, which was located immediately adjacent to the airport property. Moreover, the court did not say that the ordinance was unconstitutional as applied to all air space in the vicinity of the Gary airport, but only the air space that is "ordinarily usable."

The court concluded its opinion by repeating that the ordinance was "wholly void *insofar as it purported to authorize the taking of private property without compensation therefor."* (R. 217; emphasis supplied). It did *not* hold the ordinance void insofar as it did *not* purport to take private property without com-

pensation, nor did it hold that the ordinance effected a taking wherever it applied.[36]

That the court did not strike down the airport zoning ordinance in its entirety, if not made sufficiently clear by the limiting language of the court's opinion, is made so by section 12 of the ordinance itself, which provides that if the application of the ordinance to any person is held invalid, such invalidity shall not affect other applications of the ordinance.[37] Certainly the court would not have ignored this provision had it meant to hold, on the basis of the invalid application shown in this case, that the entire ordinance was null and void as to all applications.

Finally, even if it is assumed, contrary to fact, that the Supreme Court of Indiana invalidated the Gary airport zoning ordinance in its entirety, it does not follow, as petitioners assert, that the court held broadly that airport zoning is a constitutionally impermissible

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[36] In their brief, petitioners refer to another passage in the opinion of the court below in which it spoke of the ordinance as "invalid as an entirety." (Pet. Br. 20). An examination of the passage in which these words occur shows that the court was not holding the ordinance void or invalid as applied in other circumstances to other property. The reference to the statute being "void in its entirety" was made in discussing whether respondent was required to apply for a variance in accordance with the provisions of the ordinance. The court held that the provisions of the ordinance relating to applications for a variance, as well as its other provisions, were invalid as applied to respondent. (R. 214).

[37] Section 12 of the ordinance states: "If any of the provisions of the ordinance or the application thereof to any person or circumstances [is] held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable." (R. 157).

method of providing safe approaches for airports. As we shall show at pages 37-48, *infra*, the correctness of the decision below turns on the fact that application of the Gary ordinance to respondent's property would have prohibited any structure extending more than 18 feet from the ground and that this so far interfered with the normal and reasonable use of the property as to amount to a taking. Under the decision of the court below the City of Gary is free to enact an airport zoning ordinance containing height limits that are not so low as to constitute a taking of property within the meaning of the fourteenth amendment. It might, for example, promulgate an ordinance like the model zoning ordinance prepared by the Federal Aviation Agency, which is set forth in the appendix to petitioners' brief and which contains height limits that do not raise the constitutional problems posed by the Gary ordinance. See pages 40-41, *infra*. There is, therefore, no basis for petitioners' assumption that the decision below laid down a general rule that the police power cannot be exercised to zone property within the vicinity of a public airport for the purpose of maintaining safe and unobstructed access or that "the governmental means to serve this end are restricted to purchase or condemnation." (Pet. Br. 20).

B. The Court Below Was Correct in Holding That the Ordinance as Applied to Respondent's Property Would Constitute a Taking for Which Compensation Must Be Paid.

1. The Imposition of a Height Limitation Prohibiting Structures More Than Eighteen Feet From the Ground Would Be Such a Substantial Diminution of Respondent's Property Rights as to Constitute a Taking.

A zoning regulation, like any other exercise of the police power, may so substantially diminish property rights as to be a taking in the constitutional sense. See *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594

(1962); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Delaware, L. & W. R.R.* v. *Town of Morristown*, 276 U.S. 182, 193 (1928); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413, 415-16 (1922).

This Court has recognized that the intrusion into and the use of the air space above land may so far diminish or impair the rights of the landowner as to constitute a taking. See *United States* v. *Causby*, 328 U.S. 256 (1946) and *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). In *Causby* this Court declared that if, "by reason of the frequency and altitude" of flights, landowners could not use their land for any purpose, their loss would be "as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it;" "in those circumstances there would be a taking. . . . The fact that the planes never touched the surface would be . . . irrelevant. . . . The owner's right to possess and exploit the land—that is to say his beneficial ownership of it—would be destroyed." (328 U.S. at 261-262).

This Court observed that the principle applies also if the enjoyment and use of land is only partially destroyed. "The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the air space immediately above the land would limit the utility of the land and cause a diminution in its value." In such a case, said the Court, there would be a partial taking. "The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his ex-

ploitation of it." (328 U.S. at 262, 265). The *Griggs* case rests on similar premises.

The fact that *Causby* and *Griggs* involved trespass into air space and not the validity of airport zoning regulations does not, as petitioners assert, make those cases inapplicable. (Pet. Br. 48-50). In each case the issue was whether there had been a taking in the constitutional sense by reason of governmental action; in the *Causby* case by the federal government, in the *Griggs* case by a subdivision of the state. In each case this Court held that such a taking had occurred. Petitioners never explain why the test of what constitutes a taking should vary depending upon whether the taking is accomplished by trespass or by regulation. In either case the question is whether governmental action has interfered or would interfere so substantially with the landowner's normal and reasonable use of his property as to require the payment of compensation.[38]

In *Causby* and *Griggs* the Court held that the intrusion of planes into the *air space* above the land substantially diminished the use and enjoyment of the *land,* even though there was no trespass on the land

[38] The brief *amicus curiae* of the National Institute of Municipal Law Officers argues that the application of an airport zoning ordinance can never amount to a taking because a property owner suffers a taking "only when the government has transferred unto itself whatever private rights in airspace are actually recognized by the Courts." (NIMLO Br. 12). The argument is contrary to this Court's holding in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), and to the principles stated in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). The other *amici* briefs concede that the application of an airport zoning ordinance may constitute a taking in particular cases. Indeed, the Air Transport Association acknowledges that the Gary ordinance might constitute a taking if applied to the land involved in this case. (ATA Br. 15).

itself. Here the ordinance, if applicable, would have substantially diminished the use and enjoyment of respondent's land by imposing a drastic limitation on the height of the structures that could be placed on the land. And concededly in this case there will be intrusion by aircraft into the air space above respondent's land; indeed, petitioners' entire case rests on the assumption that they are entitled to damages because the intrusion into the air space by certain types of aircraft will be curtailed or diminished by reason of the height of the highway. Indeed the interference with respondent's use and enjoyment of its property is at least as direct as the type of interference that follows from the intrusion of aircraft into the air space above land. The instant case involves not simply flights over the land but a direct prohibition against erection on the land of structures more than eighteen feet in height.

Petitioners also attempt to distinguish *Causby* and *Griggs* on the ground that those cases protect land use by requiring compensation where flights impair such use whereas "airport zoning still allows ample land use below the defined height limits." (Pet. Br. 49).[39] But the airport zoning ordinances in this case do not allow "ample land use below the defined height limits." A limitation that makes it unlawful for a landowner to maintain on his property any structure

[39] As part of the same argument petitioners attempt to distinguish Causby and Griggs on the ground that those cases deal with the "downward reach of aircraft," not the "upward reach of structures." The infirmity of this argument is that the height limitation imposed on respondent's property reached downward so far that, if enforced, it would have resulted in the very sort of limitations on land use that were found to have resulted from the low flying aircraft in Griggs and Causby.

exceeding 18 feet in height is so drastic and substantial an interference with the normal use and enjoyment of property as to constitute a taking under the test laid down in *Causby* and *Griggs*. As this Court said in *Causby* (328 U.S. at 264): "Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted. . . ." It could hardly be disputed that a height limitation of 18 feet is a substantial interference with the right of a landowner to control "the immediate reaches of the enveloping atmosphere;" such a limitation would apply to most houses and to many trees.

The federal authorities, who are responsible for what petitioners describe as "federal aviation policy," have recognized that the imposition of a height limitation of 18 feet on land adjacent to an airport is so substantial an interference with the normal use and enjoyment of the property as to raise serious constitutional problems unless it is achieved by the payment of compensation. This recognition is significant, not so much because of its deference to familiar constitutional principles, but rather because it represents the informed judgment of persons experienced in the field with respect to the kinds of height limitations that might as a question of fact be regarded as substantially diminishing property rights.

In July 1960 the FAA prepared and promulgated a model airport zoning ordinance "for use as a guide by the political subdivisions of those states which have enacted airport zoning enabling acts." (Pet. Br. App. 27a-30a). That model ordinance established height

limitations governing structures on land located in airport approach zones but specifically provided:

> "Nothing in this Ordinance shall be construed as prohibiting the growth, construction or maintenance of any tree or structure to a height up to 45 feet above the surface of the land." (Pet. Br. App. 38a).

The FAA explained this provision in the Foreword to the model ordinance:

> "The model ordinance also prescribes height limitations for each of the zones established by the ordinance. Any height limitations imposed by an airport zoning ordinance must be 'reasonable' meaning that the height limitations prescribed should not be so low at any point as to constitute a taking of property without compensation. Therefore, the zoning ordinance should not purport to impose height limitations in any area where the approach slope is close to the ground, which is generally the case in the innermost portions of the approach zone. This problem is taken care of in the model ordinance in Section IV, Height Limitations, which provides that the ordinance shall not be construed as prohibiting the growth, construction, or erection of any tree or structure to a height not to exceed 45 feet.
>
> "In cases where the airport is located in an area of undeveloped and relatively barren land the excepted height may possibly be as low as 35 feet. On the other hand if the airport is located in an area that is somewhat built up and where normal use of the land may involve structures 40 to 50 feet in height it would probably be desirable to establish the excepted height limitation at 55 or possibly 60 feet." (Pet. Br. App. 28a-29a).

This is a plain recognition by the FAA that, in normal circumstances, a height limitation preventing the erec-

tion of structures within 45-50 feet of the land's surface would probably be a taking for which compensation is required. In the case of land in an "undeveloped and relatively barren area" the height limit "may possibly be as low as 35 feet" before it becomes a taking. It is sufficient to note that the limitation in the present case, if enforced, would prohibit structures extending more than 18 feet above the surface of respondent's land, and that this land was located in a highly developed industrial area. (R. 110). Thus, the Gary ordinance does not comply with the standards prescribed by the FAA to meet constitutional limitations.

The limits on the zoning power contained in the FAA's 1960 model ordinance are a refinement of the earlier model ordinance prepared in 1947 by the Civil Aeronautics Administration in conjunction with the National Institute of Municipal Law Officers (*amicus curiae* in this case). The 1947 model ordinance did not set out specific height limits but it recognized the same constitutional limitations that were discussed in the Foreword to the 1960 model ordinance. Petitioners suggest that the Gary ordinance, adopted in 1949, was "tailored from" the 1947 model. (Pet. Br. 36, App. 49a-60a). However, like petitioners here, the City of Gary failed to take account of the constitutional limitations recognized in the Foreword to the 1947 model ordinance:

> "Such aeronautical considerations, however, are not the only ones that should be taken into account in determining what the regulations should be. It is hardly necessary to point out that any airport zoning regulation must, as is stated in Section 6(1) of the model act, be 'reasonable' meaning that the height limits prescribed may not be so low that they would constitute a taking of prop-

> erty without compensation in violation of the Federal and State Constitutions. Since CAA standards call for unobstructed airspace above 30 or 40 to 1 flight path beginning at the end of the runway at ground level, it is apparent that a height limit as low as that necessary cannot be imposed by the airport zoning method for some distance from the end of the runway, this distance depending upon many factors such as the use made of the property in the neighborhood. Consequently, it should be decided locally, after the necessary airport approach flight paths have been determined, the distance from the airport within which the height of structures may not be so limited without being confiscatory, and from this point to the airport boundary aviation easements or title should be acquired as provided in Section 13 of the model act." [40]

In this case respondent's land is located on the boundary of the airport property and less than one-fourth of a mile from the end of the north-south runway. The surrounding area is industrial. Steel mills were located just to the north of the airport. There were gas producing plants to the west and other businesses on the east. Railroads were located contiguous to respondent's property on the south. (R. 109-110).

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[40] Pet. Br. App. 50a. The Model Act referred to is the Model State Airport Zoning Act published in 1944 by the CAA and the NIMLO. Section 13 of this Act provides for the outright acquisition of property rights "in any case in which . . . the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations." (App. (p. 3a).

Excerpts from the Model Act are reproduced in the appendix to this brief, pp. 1a-3a. Most of the states have adopted enabling acts "substantially similar" to the model act published by CAA and NIMLO in 1944. (Pet. Br. 23). Hundreds of local communities have patterned airport zoning ordinances after the FAA or CAA-NIMLO models.

This was not an undeveloped or barren area but rather an area that was being used for industrial purposes. The President of the Board of Aviation Commissioners testified that the area is "highly industrial." (R. 110).

In the passage quoted above the CAA and NIMLO recognized that "a height limit as low as that necessary" to achieve a 40 to 1 flight path "cannot be imposed by the airport zoning method for some distance from the end of the runway." In view of the proximity of respondents' property to the end of the runway, the use made of the property in the neighborhood, and the fact that to attain a 40 to 1 flight path the Gary ordinance imposes a height limitation of 18 feet on respondents' property, it is apparent that the ordinance does not meet the standards suggested in the Model.

We have pointed out at pages 27-28, *supra*, that the Administrator of the Federal Aviation Agency has issued regulations prescribing the conditions that must be met if federal aid is to be granted for the construction of an airport and that these regulations require that an adequate property interest be acquired in "runway clear zone areas." We have also pointed out that under these regulations respondents' property is well within the "runway clear zone" of the Gary airport. It is significant that the Administrator's explanation for the adoption of the runway clear zone regulation makes it clear that he acted on the basis of constitutional doctrines. That explanation states:

> ". . . in absence of special circumstances, adoption of height limit regulations without compensation under the State police power is of questionable legal validity if the height limits prescribed

> *are low and run the risk of constituting a taking of property without compensation, contrary to the State and Federal constitutions.* Consequently, in the absence of unusual circumstances, the adoption of protective measures by legislation cannot be considered a satisfactory substitute for the acquisition of property interests for the entire runway clear zone area, and should be regarded as a possible alternative in any particular case only in the outer portions of the runway clear zone area and then only if and to the extent it can be determined that the applicable height limits are not confiscatory." 22 Fed. Reg. 7735 (1957) (emphasis supplied).

Petitioners point to a number of studies which they describe as "advocating airport zoning to protect aerial approaches." (Pet. Br. 29). Not one of these studies provides any support for petitioners' argument that the City of Gary can impose a height limitation of 18 feet to protect an aerial approach without the payment of compensation. In fact the so-called Doolittle Report, which was made to the President in 1952, is adverse to petitioners' contentions.[41] That report stated:

> "The power to zone . . . is a limited one. . . . Of primary importance . . . is the fact that it cannot go beyond the line of regulation and become an actual 'taking' of property without just compensation. . . . It also would appear evident that while any State action settling a 'navigable zone' for aircraft approaching an airfield could be justified on the broader ground of benefit to the

[41] The Airport and Its Neighbors: The Report of the President's Airport Commission (1952).

> community as a whole, it also might be considered a 'taking' which could only be accomplished through eminent domain if, in fact, it resulted in a substantial diminution of value of the land."[42]

To meet this problem where it was most acute—in the area immediately adjacent to airport runways—the Report recommended establishment of "an extension or over-run area at least one-half mile long and 1,000 feet wide" measured from the ends of the dominant runways. These areas would be "incorporated in the airport itself."[43] In other words, the Doolittle Commission thought that the answer to the problem of obstructions in the areas immediately adjacent to airport runways was acquisition of land up to one-half mile beyond the dominant runways. This recommendation may be compared with the instant case, where respondent's property was only 1,043 feet beyond the present end of the Gary airport runway, and, according to petitioners (Pet. Br. 7, n. 3), a mere 443 feet beyond the end of the proposed runway.

Petitioners argue that height limitations are "strictly germane to preserving unobstructed approaches to the airport and essential to maintaining safe flight." (Pet. Br. 43). This in effect is an argument that any regulation reasonably related to a legitimate governmental objective can never be a taking within the meaning of the fourteenth amendment. The argument rests on a misconception of the law. Even an exercise of the power of eminent domain must be reasonably related to a proper governmental purpose because otherwise property is not taken for public use. It follows

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[42] Id. at 72.

[43] Id. at 7, 36.

that the question whether an exercise of governmental power is merely regulatory in character or amounts to a taking for which compensation must be paid cannot be resolved merely by demonstrating that the exercise is reasonably related to a proper governmental purpose. As this Court said in *Delaware, L. & W. R.R.* v. *Town of Morristown,* 276 U.S. at 193:

> "But, assuming that under the circumstances the creation of the public hack stand would be a proper exertion of the police power, it does not follow that the due process clause of the Fourteenth Amendment would not safeguard to the owner just compensation for the use of its property. *Penna. Coal Co.* v. *Mahon,* 260 U.S. 393, 416. The police power may be and frequently is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him."

The issue here, therefore, is not whether there is any way in which the City of Gary can properly act to protect airport approach zones but whether the City chose a constitutionally correct method of achieving that legitimate governmental objective. That question turns on whether the zoning ordinance, by imposing a height limitation of 18 feet, so substantially interferes with the normal and reasonable use of property as to constitute a taking for which compensation must be paid. On that point the decisions of this Court in *Causby* and *Griggs* and the actions of the federal aviation au-

thorities described above show that the ordinance transcends constitutional limitations."

Both the petitioners and certain of the *amici curiae* seek to draw support from the decisions relating to the validity of comprehensive zoning laws. We submit that there is a distinction between such laws and height limitations in airport zoning regulations that makes these arguments inapposite on the question whether there has been a taking in the present case. A comprehensive zoning regulation does not give an adjoining landowner or anyone else a right to use the property that is zoned. It merely imposes upon all landowners in the area affected uniform restrictions as to the use of their land that are as-

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" Petitioners cite decisions by the courts of Florida and Alabama sustaining airport zoning regulations. (Pet. Br. 40-42). These decisions do not stand for the broad proposition that in all circumstances a zoning regulation is a permissible constitutional means for establishing airport approach zones. In two of the cases the courts upheld the regulations in question against challenges to the regulations in their entirety without regard to their application to particular property. The third held that an airport zoning regulation was not invalid as applied to the particular facts there involved. In all three cases the courts recognized that such regulations might in other circumstances so interfere with the reasonable use and enjoyment of property as to constitute a taking for which compensation would have to be paid. Baggett v. City of Montgomery, 160 So.2d 6, 9 (Ala. 1963); Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111 So.2d 439, 445 (Fla. 1959); Waring v. Peterson, 137 So.2d 268, 272 (Fla. App. 1962). For state decisions holding that the application of airport zoning regulations to particular property constituted a taking for which compensation was required see Roark v. City of Caldwell, 394 P.2d 641 (Ida. 1964); Sneed v. County of Riverside, 218 Cal. App.2d 205, 32 Cal. Rep. 318 (1963); see also Bowling Green-Warren County Airport Board v. Long, 364 S.W.2d 167, 171 (Ky. App. 1962).

sumed to be for the benefit of all. In contrast, a height limitation in an airport zoning regulation is designed to regulate land use by the owner in order that his property may be used by others. In effect such a limitation gives to the operators of airports and aircraft a servitude over or an easement in the air space above the land to which the regulation applies. See *United States* v. *Causby*, 328 U.S. at 267. It therefore does not merely restrict the owner of particular land in the exercise of property rights but in fact transfers some of those rights to others. See *Sneed* v. *County of Riverside*, 218 Cal. App.2d 205, 209, 32 Cal. Rep. 318, 320 (1963); *Yara Eng'r Corp.* v. *City of Newark*, 132 N.J.L. 370, 373, 40 A.2d 559, 561 (1945). Such a limitation imposes a burden upon property in proximity to an airport that is more "direct and peculiar and substantial" than the burden imposed by a comprehensive zoning law. In another context this Court has recognized that in determining whether there has been a taking of property a distinction should be recognized between a burden of this character and a "diminution of the value of the property not directed or peculiarly affected, but sharing in the common burden." See *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, 554, 557 (1914).

The essential difference between comprehensive zoning and airport zoning ordinances that impose height limitations in air approach zones may be illustrated by reference to the example adverted to in the opinion of this Court in *Griggs* v. *Allegheny County*, 369 U.S. at 89-90. No one would assume that a public authority could obtain the easements required for approaches to a bridge simply by promulgation of a zoning regula-

tion.[45] Yet that is precisely what petitioners are arguing that the City of Gary could constitutionally do in this case with respect to the approaches to the airport.

The peculiar nature of airport zoning regulations is a fact that should be taken into account in determining whether the application of an airport zoning ordinance to particular property constitutes a taking. This does not require the conclusion that all height limitations contained in airport zoning ordinances are necessarily invalid without regard to their character or the effect of their application. The point is that in considering whether a particular height limitation in an airport zoning ordinance as applied in a particular case is so "direct and peculiar and substantial" an interference with property rights as to amount to a taking, decisions relating to comprehensive zoning laws, which are designed to achieve different ends and which operate in a different way, are not controlling or persuasive.

Petitioners attempt to support their constitutional arguments by two other contentions that raise questions of Indiana law. The first contention is that respondent had no standing to raise a constitutional question as a defense in this lawsuit because it did not take advantage of the provision in the ordinance permitting it to seek a variance. On this point the Supreme Court of Indiana held that since the ordi-

[45] In the Griggs case this Court said (*ibid*):

> "A county that designed and constructed a bridge would not have a usable facility unless it had at least an easement over the land necessary for the approaches to the bridge. Why should one who designs, constructs, and uses an airport be in a more favorable position so far as the Fourteenth Amendment is concerned? That the instant 'taking' was 'for public use' is not debatable."

nance did not contain a provision for compensation in the event that a variance was denied respondent was under no obligation to seek a variance as a condition precedent to raising the objection that the ordinance as applied to its property constituted a taking for which compensation should be paid. (R. 214-215). Whether respondent was required to exhaust its administrative remedies under the local ordinance is a question of Indiana law on which the decision of the court below is conclusive.[46]

It should also be noted that petitioners' contention ignores the practicalities of the situation. Respondent had settled all of its differences with the City of Gary relating to the location and construction of the highway and had agreed to pay the city $1,500,000. As a part of the settlement the city agreed to the route of the highway. Until this lawsuit was instituted respondnet had no reason to believe that there was any occasion for it to seek a variance.[47] In effect petitioners are arguing that because respondent in good faith relied upon this settlement agreement it should be precluded from raising any constitutional question once the ordi-

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[46] In support of this holding the court cited Finney v. Johnson, 242 Ind. 465, 179 N.E.2d 718 (1962).

[47] Apart from the settlement agreement there was another reason why it was unnecessary for respondent to seek a variance. It is well established that local zoning ordinances do not apply to state bodies having the power of eminent domain. See, *e.g.*, Town of Bloomfield v. New Jersey Highway Authority, 18 N.J. 237, 113 A.2d 658 (1955); State *ex rel.* Ohio Turnpike Comm'n v. Allen, 158 Ohio St. 168, 174-75, 107 N.E. 2d 345, 350, *cert. denied sub nom.* Balduff v. Ohio Turnpike Comm'n, 344 U.S. 865 (1952); City of Medford v. Marinucci Bros. & Co., 344 Mass. 50, 181 N.E.2d 584 (1962); Rhyne, Municipal Law 306-07 (1957). This question was presented but not reached in the court below. (R. 210).

nance was made the basis of a suit by private parties. Furthermore petitioners' argument on the variance point is incongruous when viewed in the light of their insistence that respondent's toll road is a dangerous hazard to safe air navigation.

Petitioners' second point is that if there was a taking in this case respondent could have obtained compensation by a resort to the "inverse condemnation" procedure established by Indiana law. (2 Burns' Ind. Stat. § 3-1711 (1946 Repl.)). The court below held that this provision of the Indiana statutes did not apply in the instant case. It rested its holding on two grounds. The first was that under Indiana law the inverse condemnation procedure is not available unless there has been an actual encroachment on the land alleged to have been taken and that in this case no encroachment as yet had actually occurred. This holding turns entirely on the interpretation and application of Indiana law and is conclusive on this Court.[48] The second

[48] The court below reasoned that there could have been no encroachment on respondent's property because of a railroad catenary system and several obstruction light poles located beyond and extending well above the toll road. These pre-existing structures limited the glide slope to a considerably greater degree than would have the toll road had it stood alone, and prevented aircraft from flying low enough to intrude into that portion of respondent's air space that was included within the airport approach zone. Petitioners dispute the Indiana court's interpretation of the inverse condemnation statute (Pet. Br. 46, n. 49), but these efforts are pointless because this Court will not revise the Indiana court's interpretation of Indiana law. Petitioners also contend that the court's finding that there was no actual encroachment in respondent's air space is inconsistent with its earlier determination that the ordinance, if applicable to respondent's land, would constitute a taking. (*Ibid.*). Petitioners overlook both the nature of their suit and the nature of the basic holding of the court below. The gist of petitioners' complaint was that the ordinance had not been but should be enforced against respondent. The court below did not

ground for the holding was that under Indiana law the inverse condemnation procedure is not available where the taking is accomplished pursuant to a zoning regulation that makes no provision for compensation. (R. 216-217). This holding was correct because any contrary result would have required the court to assert legislative authority by requiring the expenditure of public funds in circumstances and for a purpose not contemplated by the legislative enactment. But whether correct or not the holding is an interpretation and application of an Indiana statute and raises no question for review by this Court.

2. The Theory of Petitioners' Claim for Damages Necessarily Assumes That the Zoning Ordinance Effected a Taking of Property Rights.

The basic legal theory relied upon by petitioners to support their claim for damages rests on the assumption that the zoning ordinance constituted a taking of property rights. The petitioners are seeking damages for alleged loss of future profits which it is claimed will be inflicted because respondent's road extends into the airport approach zone to a height prohibited by the zoning ordinance. It is apparent from petitioners' complaint and from their arguments in the court below that their claim is based on the ground that they have *property rights* in the airport approach zone that respondent has invaded. Petitioners' theory is that they obtained these property rights under the lease that they executed with the City of Gary in 1950. Paragraph 3-k(6) of their complaint alleged that under the lease petitioners obtained "the right of ingress and

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hold that the ordinance had been enforced and that there had been an unconstitutional taking but that the ordinance if applied to respondent's property would constitute an unconstitutional taking.

egress" to and from the airport and that this right was extended to "all those dealing with these plaintiffs and the aviation business." (R. 5). Paragraph 5-d of the complaint further alleged that the establishment of respondent's highway constituted an unlawful taking of the petitioners' property rights without compensation and without due process of law. (R. 9). The theory underlying these allegations was made more explicit in the brief filed by petitioners in the court below. In that brief petitioners argued that "the zoning provisions constituted easements appropriated by the City which became a part of our leasehold." (p. 24). They further argued that the toll road "invaded the air space composing our way of ingress and egress to the airport." (p. 25).

Petitioners' determination to base their cause of action on their asserted property interest in the air space constituting the airport approach zone was not fortuitous but was designed to avoid a difficulty that might otherwise have been a serious obstacle to their claims. Conceivably petitioners might have attempted to proceed on the theory that an asserted violation of the zoning ordinance had inflicted injuries upon their business for which they were entitled to recover damages under the ordinary principles of tort law. Had they done so they would have been faced with the fact that the City of Gary had by its own actions precluded itself from applying the ordinance to respondent's property. In those circumstances petitioners would have been faced with the formidable if not insurmountable difficulty of justifying the assertion of an ordinary claim in tort based on an alleged violation of a municipal regulation that the municipality itself was disabled from enforcing against respondent. Petitioners

avoided this difficulty by taking the position that their lease from the City conveyed to them property rights in the air space above respondent's land which respondent had invaded by the construction and maintenance of the highway.

The serious character of the difficulty that petitioners thus sought to avoid will be apparent from a brief recital of the facts relating to transactions between respondent and the City of Gary that preceded the construction of the road.

Differences had arisen between the city and respondent after respondent announced its intention to construct the road, the former being concerned lest the road interfere with certain city streets, sewer lines, and the northwest-southeast runway of its airport (not the runway in question in this case). These differences led to a lawsuit. In August 1955 a settlement agreement was made between the City of Gary and respondent that was intended to resolve all controversies, including the lawsuit.

The agreement specifically approved the route of the toll road as set forth in an exhibit attached thereto (except for modifications and changes provided in the agreement). The agreement required that the proposed road be rerouted in the vicinity of the northwest-southeast runway of the airport in order to preserve a 50-1 glide angle. But it did not require that the proposed road be rerouted insofar as it affected the glide angle of the north-south runway (the one involved in this case). Hence, by its terms, the agreement approved respondent's proposal for that portion of the road, which was ultimately constructed in accordance with the proposal. Moreover, the agreement provided for a consideration of $1,500,000 to be paid to the city

by respondent on account of the damage that the city would suffer as a result of the construction and operation of the toll road. The agreement recited the "mutual desirability" of an "amicable adjustment" of the controversies between the parties and of the "early construction" of the toll road and included a covenant by the city to "cooperate with the Commission in order that the East-West Toll Road through Gary may be expedited." (Def. Ex. D, Tr. 949).

The agreement was submitted to and approved by the Board of Aviation Commissioners of the City of Gary, the Mayor of the City of Gary, and the Common Council of the City of Gary, the body that enacted the Gary Airport Zoning Ordinance (*Id.*, R. 157). This agreement extinguished whatever capacity the City may have had to enforce the airport zoning ordinance to prevent the road's construction and left respondent free, so far as the City was concerned, to construct the road in the location and at the height disclosed by its proposals, which is exactly what respondent did.

It is significant that the City of Gary has adhered to the settlement agreement and has made no attempt to enforce the zoning ordinance against respondent. It is also significant in this connection that the court of first instance in Indiana did not grant petitioners' prayer for injunctive relief, possibly because it recognized the incongruity of requiring respondent to remove or to modify a road whose location and construction the City of Gary had itself approved.[49] In no sense can it be said that this case is an attempt to remove from the air approach zone a hazard to air navigation. The City of Gary has made no such attempt and the court below denied petitioners this kind

[49] Petitioners did not appeal the denial of injunctive relief.

of relief. In the present posture of the case petitioners are simply attempting to require respondent to pay them $164,000 for an alleged invasion of their property interests.

It is by no means clear that by choosing to base their claim upon an invasion of alleged property interests, as contrasted with the violation of a police regulation, petitioners have been successful in avoiding the difficulties created by the settlement between the City of Gary and respondent. But that point aside, petitioners' adoption of the theory that they are entitled to recover damages for the invasion of property interests is fatal to their argument that there would not be a taking if the ordinance should be applied to respondent's property. If, as petitioners assert, they are now the owners of "easements" in the air space that constitutes the airport approach zone, the question arises as to the origin of that property interest. It is petitioners' theory that the property interest was conveyed to them by the City. It also seems to be their theory that the City acquired this property interest by reason of the zoning ordinance. But if, as petitioners assert in their brief in the court below (p. 24), "the zoning provisions constituted easements appropriated by the City" then it necessarily follows that this interest was appropriated from the owner of the land, an appropriation that plainly constituted a taking for which no compensation was ever paid.

CONCLUSION

For the foregoing reasons (1) the writ of certiorari should be dismissed because the judgment of the Supreme Court of Indiana rests on an independent and adequate state ground or (2) in the alternative, the

judgment of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

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APPENDIX A

Excerpts from Model State Airport Zoning Act (November 7, 1944)

CIVIL AERONAUTICS ADMINISTRATION, U. S. DEPARTMENT OF COMMERCE

and

NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

* * * * * * * * * * *

Section 6. Airport Zoning Requirements.

(1) *Reasonableness.* All airport zoning regulations adopted under this Act shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this Act. In determining what regulations it may adopt, each political subdivision and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable.

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Section 11. Judicial Review.

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(6) In any case in which airport zoning regulations adopted under this Act, although generally reasonable, are held by a court to interfere with the use or enjoyment of a particular structure or parcel of land to such an extent, or to be so onerous in their application to such a structure or parcel of land, as to constitute a taking or deprivation of that property in violation of the Constitution of this State or the Constitution of the United States, such hold-

ing shall not affect the application of such regulations to other structures and parcels of land.[14]

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[14] It has been suggested that provisions be included in this model act giving a landowner a right to compensation where the application of airport zoning regulations to his property otherwise would constitute an unconstitutional taking of his property, and prescribing the procedure to be followed in obtaining such compensation. It appears that several such procedures might be devised, including: (1) the bringing of a court action by the landowner for damages; and (2) the filing of a claim for compensation with the Board of Adjustment, with the Board either (a) making the award itself, subject to appeal to a court, or (b) determining merely that compensation is due, the effect of such a decision being to require the political subdivision to bring condemnation proceedings as authorized in Section 13.

The principal advantages to be gained by so providing for compensation where a zoning regulation is too great an invasion of private property rights is that this would go far to prevent the invalidation of any such regulation and permit the imposition of zoning restrictions as stringent as necessary to prevent the establishment of any airport hazard, regardless of their effect upon the property owners. However, the inclusion of any such provisions would make those political subdivisions that adopted regulations liable for damages which they could not foresee or estimate with any great degree of accuracy, which might well outweigh the advantages noted. Largely for this reason, no provisions such as those suggested have been included in this model act.

As a result, if any regulation adopted under this act attempted to impose a restriction upon any particular property which could not be imposed without compensation, the remedy available to the landowner would be to bring suit to have it declared unconstitutional and invalid, rather than an action for damages. This would leave it to the political subdivision or owner of the airport to acquire property interests in the property in question under Section 13, which might be deferred until this should become necessary to prevent the threatened creation of an airport hazard.

While it will therefore be necessary that any airport zoning regulations adopted under this act be carefully formulated to the end that they may be generally rasonable in their application to the property zoned, the inclusion of this subsection (6) should help to prevent invalidation of the entire ordinance or resolution, or even any particular section thereof, where it is held unreasonable in its application to a particular structure or parcel of land.

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Section 13. Acquisition of Air Rights. In any case in which: (1) it is desired to remove, lower, or otherwise terminate a non-conforming structure or use; or (2) the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this Act; or (3) it appears advisable that the necessary approach protection be provided by acquisition of property rights rather than by airport zoning regulations, the political subdivision within which the property or non-conforming use is located or the political subdivision owning the airport or served by it may acquire, by purchase, grant, or condemnation in the manner provided by the law under which political subdivisions are authorized to acquire real property for public purposes, such air right, aviation easement, or other estate or interest in the property or non-conforming structure or use in question as may be necessary to effectuate the purposes of this Act.